STATE OF MICHIGAN

COURT OF APPEALS

MARK HARRISON and TAMARA HARRISON, Plaintiffs-Appellants, v ROCHESTER HILLS SKATING CENTER, Defendant-Appellee.	UNPUBLISHED November 27, 2001 No. 224932 Oakland Circuit Court LC No. 99-012147-NO

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Plaintiffs Mark and Tamara Harrison[1] appeal as of right the trial court's order granting defendant Rochester Hills Skating Center (RHSC) summary disposition in this action alleging negligence and loss of consortium. We affirm.

I. Basic Facts

RHSC is a roller skating rink. On November 28, 1998, Harrison went to RHSC with his family to attend his niece's birthday party. Initially, Harrison socialized with other people at the party. However, after eating, Harrison decided to roller skate. He approached the skate rental area to exchange his shoes for a pair of skates. Because his brother had arranged and paid for the party, Harrison did not have to pay for the rental. Harrison told the RHSC employee behind the rental counter his shoe size and received a pair of roller skates that had a low-cut shoe that covered his foot to the point just above the ankle. This was like the shoe on a speed skate, not a like a traditional figure skate with a full boot.[2] He did not receive any instructions from the employee. Harrison did not recall seeing any "skate at your own risk" signs at RHSC.

When he put on the skates, Harrison felt that they were the correct size. He first laced the right skate completely, tying the lace with a single knot. Harrison then realized that the lace for

[1] Tamara Harrison's claims are purely derivative. Therefore, we refer to Mark Harrison as "Harrison" unless otherwise indicated.

[2] Whether these skates had traditional rollers at the four corners of the shoe instead of in-line rollers is not clear.

the left skate was significantly shorter than the lace on the right skate. The lace also had frayed ends and was missing the aglet, the small plastic coating that typically binds the end of a lace, at both ends. At the time, Harrison remarked to his sister that the lace was too short, but she reportedly said that the lace must be adequate or RHSC would not have allowed him to have the skates. Rather than going back to the rental counter to obtain a new lace, Harrison decided to use the short lace. He laced the left skate as much as possible and tied a single knot, leaving approximately four eyelets at the top of the skate unsecured. This left the skate laced no higher than the middle of Harrison's left ankle bone.

Harrison had been a decent, though not highly skilled, roller skater as a teenager. However, by November 1998, between fifteen and twenty years had passed since he last skated. On this day, Harrison made it around the skating rink once. He felt comfortable and did not have to hold onto anything for support, but then decided to sit with his mother to take a break. After ten or fifteen minutes, he decided to skate again. Harrison's sister called out to him as he was about halfway through his first lap, going around a curve. Harrison replied and, while doing so, he looked to the left without turning his shoulders. He felt that he was losing his balance. Harrison unsuccessfully tried to "catch" his balance, but his left ankle bent all the way to the floor, and he fell. He estimated that this accident took, in total, approximately two to five seconds. Though he did not believe that the short skate lace had caused him to lose his balance originally, he thought that his "ankle wouldn't have given way if [he] had more support." In other words, Harrison believed that if he had a longer lace and had been able to fasten his left skate securely, he would have been successful at "maintaining" his balance and then would have been able to avoid falling.

Immediately following the fall, Harrison felt pain in his left ankle. At his request, Harrison's sister removed the skate for him. Two RHSC employees, one of whom may have been an owner, approached Harrison to offer him an ice pack and take an incident report. Harrison said that he told this RHSC employee his name and described the incident. He also told one of the employees that his "skates didn't lace all the way up." Harrison declined their offer to call an ambulance and had his wife drive him to the hospital.

According to Harrison, his physicians determined that he had dislocated his left foot and fractured it in two places. Harrison also sustained what he called a "fracture blister," which caused a burning sensation for about ten weeks. Harrison underwent surgery and had a metal plate and several screws implanted to help heal his injury. Harrison had a cast on his left foot and leg until March 1999. From the time of his injury through the beginning of April 1999, when he finished physical therapy, Harrison was forced to use crutches. He also used prescription pain killers until February 1999.

Harrison, an experienced used car salesman, was not able to go back to work at Gage Oldsmobile until January 4, 1999. Even when he returned to work, he was not able to perform fully because his injury prevented him from walking with customers to look at cars. Instead, he arranged to split his sales commissions with colleagues who were willing to do his "legwork" for him while he stayed at a desk, a situation that lasted through mid-March 1999. Accounting for completely lost wages through January 4, 1999, and reduced wages for the next three months, Harrison estimated that his injury caused him to lose $11,000 in wages. Harrison had

unreimbursed health care and medication expenses related to his injury and rehabilitation that exceeded $2,500. The injury also prevented Harrison, a former professional boxer, from working effectively with the individuals who train at the boxing gym that he and a partner own and manage, though the injury did not cause him any economic damages related to this enterprise.

II. Procedural History

Harrison sued RHSC in January 1999. In the first of two counts, Harrison claimed that RHSC negligently failed to repair or replace the skate lace, failed to warn him of the dangers of using a short lace, and failed to inspect "equipment being rented to the public in general and to [him] specifically." The second count alleged that Tamara Harrison, his wife, had suffered a loss of consortium because of his injury.

RHSC moved for summary disposition under MCR 2.116(C)(10) making three arguments. First, RHSC contended that the danger the shoe lace posed was open and obvious, absolving RHSC of any responsibility for the accident. Second, RHSC asserted that Harrison conceded that the shoe lace did not cause the accident to happen and had failed to provide any evidence that the lace proximately caused his injury. Third, RHSC argued that the Roller Skating Safety Act of 1988, MCL 445.1725, barred liability in this case, providing:

> Each person who participates in roller skating *accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary*. Those dangers include, but are not limited to, injuries that result from collisions with other roller skaters or other spectators, *injuries that result from falls*, and injuries which involve objects or artificial structures properly within the intended travel of the roller skater *which are not otherwise attributable to the operator's breach of his or her common law duties*.[3]

In support of its motion and brief, RHSC submitted photocopies of photographs to the trial court revealing the various signs that were posted informing patrons to skate at their own risk and abide by RHSC rules. A sign next to the skate rental desk specifically stated, "Please... Check Rental Skates or Blades Before Using Them. if They Need Adjustment or Repair, Please Return Them Immediately. ...Thank You[.]"[4] Along with Harrison's deposition testimony and partial medical records, RHSC also submitted the incident report regarding the accident. As "corrective actions taken," the report indicated, "WENT TO HOSPITAL (CRITTENTON) TO GET AN X-RAY[.]" Notes at the bottom of the report read, "Customer stated that this was his first time on skates in 20 years. Assisted customer to his own car where he was driven to Crittenton by his wife. Rental skates retrieved, checked and returned to rental pool. No damage." The report does not mention the short lace.

In his brief opposing the motion for summary disposition, Harrison contended that defendants failed to demonstrate that the skate was a "simple" product subject to the open and

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[3] Emphasis added.

[4] No alterations.

obvious danger doctrine. Harrison highlighted portions of his deposition testimony in which he stated that the skates did not give him enough support for him to maintain his balance as direct evidence of causation.

Harrison pointed to Steve Bernheim's affidavit as further evidence of causation. Bernheim, an expert in the skating industry, averred "that Mr. Harrison's injuries to his left ankle are the direct result of Mr. Harrison's being given a pair of roller skates which did not provide adequate ankle support because of a broken lace." Bernheim stated that "the 'speed skate' type skates rented to Mr. Harrison also contributed to Mr. Harrison's injuries and that such skates are disfavored generally in the industry because they lead to unusually high incidents [sic] of ankle injuries such as Mr. Harrison's. Bernheim also indicated that it was his "expert opinion that broken laces and rental of speed skates are precisely the types of hazards to guests that the Roller Skating Association requires be the subject of corrective action and reporting to supervisors in the Roller Skating Rink Safety Standards."

Harrison conceded that the Roller Skating Safety Act, MCL 445.1721 *et seq*., controlled this action. However, he quoted section 3, MCL 445.1723, which states in relevant part:

> Each roller skating center operator shall do all of the following:
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> * * *
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> (b) Comply with the safety standards specified in the roller skating rink safety standards published by the roller skating rink operators association, (1980).
>
> (c) Maintain roller skating equipment and roller skating surfaces according to the safety standards cited in subdivision (b).

Harrison provided the trial court with a copy of the Roller Skating Association's "Floor Staff Training Program" manual,[5] which included, among many other precautions, a number of relevant statements regarding skate safety that he highlighted: "[w]atch skates for bad stops, nails, or other protrusions;" "[s]kate rentals should be checked on a regular basis for good mechanical conditions;" "check all skates coming in top see that they are in good condition and ready to hand out the next session;" "boot laces should be in good shape;" "[i]n slack times, check and repair skates;" "fix any minor repairs or log on the manager's daily report for repair the following day;" violating "safety regulations or procedures" is "cause for dismissal;" employees are "expected to do" their" part to prevent accidents;" "make safety awareness a part of" an employee's "everyday responsibilities;" "above all," if an employee "recognize[s] a hazard to . . . guests or . . . coworkers, correct the situation and notify [a] supervisor immediately; "check for" "[f]rayed or broken laces;" "[y]our number one job is safety;" "[w]atch skates for unsafe conditions (i.e. loose trucks, wheels, toe-stops and frayed, broken laces;" and general session rules should include "[n]o speed skating, no stunt skating." Harrison also filed a copy of the Roller Skating Association "Safety Inspection Checklist," which states that "rental skates as indicated have been subject to the following inspection and corrections made when necessary[.]"

[5] RHSC evidently did not contest that this manual described industry standards.

That inspection includes, "Shoe laces in good condition without knots or frays" and "[i]nspection of boots for tears, condition of innersoles, etc." Thus Harrison contended that MCL 445.1725 did not bar liability because RHSC had failed to comply with these industry standards.

The case then went to mediation. Correspondence in the trial court record indicates that RHSC attempted to accept the evaluation. However, because RHSC's response was untimely, it was treated as an automatic rejection. Because of the failure to settle this case through mediation, the trial court was forced to consider the motion for summary disposition.

Following a hearing on the motion for summary disposition, the trial court prepared a written opinion and order. The trial court recounted the facts of the case, the allegations in the complaint, and the arguments for summary disposition. Citing *Dale v Bet-C, Inc*,[6] the trial court agreed with Harrison's contention that the Roller Skating Safety Act required him to assume many risks that are open and obvious or inherent in skating, it did not require him to assume the risk that RHSC would breach its statutory or common law duties. Noting that Harrison had provided evidence that safety standards required RHSC to check skates regularly for "mechanical condition," the trial court stated:

> Although the Court questions whether the shortness of a lace constitutes the "mechanics" of a skate, Plaintiffs have still failed to provide any evidence to this Court of Defendant's breach of this provision. Plaintiffs also cite to another provision of the RSA Safety Standards requiring that boot laces are to be checked to see if they are in good shape, without frayed or broken laces. . . . . However, both Plaintiffs and Defendant attached the incident report completed on the day of Plaintiff Mark Harrison's accident, which evidences the fact that Defendant's employee checked the skates and found no damage. Again, there is no evidence of a breach of this provision.

The trial court accepted RHSC's argument that Harrison's theory of causation was speculative and that there was insufficient evidence of causation. The trial court did not address RHSC's argument that the lace was a simple product subject to the open and obvious doctrine. Nor did it rule explicitly on the loss of consortium claim. However, because that claim was purely derivative of the negligence allegation, it is clear that trial court granted summary disposition of both counts to RHSC.

Subsequently, Harrison moved for rehearing or reconsideration of the order granting RHSC summary disposition. In that motion, he also asked the trial court to grant him leave to amend his complaint. The amended complaint, attached to the motion as an appendix, was largely the same as the original compliant. However, it also listed more specifically the duties Harrison claimed RHSC had breached, including duties: to repair or replace the short lace, warn Harrison that skating with the short lace could result in injury, inspect the equipment, ensure equipment being rented was in "good mechanical condition," provided "mechanical support" for the user's ankle, and did not have frayed or broken laces. The trial court, however, denied the

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[6] *Dale v Bet-C, Inc*, 227 Mich App 57, 60; 574 NW2d 697 (1997).

motion for rehearing or reconsideration and then considered the request to amend the complaint as moot.

III. Arguments On Appeal

Harrison raises three issues in this appeal. First, he argues that the trial court erred in concluding that he had failed to provide evidence that RHSC breached a duty under the Roller Skating Safety Act. Second, he contends that he submitted sufficient circumstantial evidence to demonstrate causation. Third, he maintains that the trial court erred in denying his request to amend the complaint.

IV. Summary Disposition

A. Standard Of Review

RHSC contends that we must review the trial court's decision to grant it summary disposition for an abuse of discretion because Harrison claimed his appeal from the trial court's order denying reconsideration, rehearing, and an opportunity to amend the complaint. We agree that the abuse of discretion standard is appropriate for reviewing each of those decisions.[7] An aggrieved party can appeal as of right from the "final order" in a case.[8] However, the nature of that final order establishing this Court's jurisdiction to hear an appeal does not define which issues the appellant may raise[9] or the appropriate standard of review for all the issues in the appeal. Case law is quite clear that we review de novo orders granting or denying summary disposition.[10]

B. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[11] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[12] The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material

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[7] See *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Kokx v Bylenda*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000); *Huspen v T & H Inc*, 200 Mich App 162, 167; 504 NW2d 17 (1993).

[8] See, generally, MCR 7.203(A).

[9] See, generally, *Gavulic v Boyer*, 195 Mich App 20, 23-24; 489 NW2d 124 (1992), citing MCR 7.204(A)(1)(b).

[10] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[11] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[12] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

issue of fact is in dispute requiring resolution at trial.[13] This holds true for every element of the prima facie case.[14] Four elements make up a prima facie case of negligence: "(1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages."[15] In the end analysis, summary disposition is appropriate if the documentary evidence establishes "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law."[16]

C. Prima Facie Case

Harrison's first argument, that he provided evidence that RHSC breached a duty, appears to be accurate. The trial court acknowledged that RHSC had a duty *not* to rent skates with frayed or broken laces, but found that there was no evidence on the record that the left lace was frayed or broken because the RHSC report did not record any defect in the lace. In fact, Harrison's deposition testimony was direct evidence that the lace on his left shoe was frayed. Further, the absence of the plastic ends on the lace and its short length in comparison to the length of the lace on the other skate would allow a reasonable person to infer that the left lace had, at one time, been longer, but had broken. At best, whether RHSC breached its duty to inspect and properly maintain the skates Harrison used, including the laces, is in dispute.

Setting aside the open and obvious danger doctrine, whether Harrison provided enough circumstantial evidence of causation to survive the motion for summary disposition is a much closer question. As the Michigan Supreme Court explained in *Skinner v Square D Co*:[17]

> [P]roving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause."
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> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue.

Harrison, in his deposition testimony, clearly indicated that he believed that if his left skate had had a longer lace, he would have been able to maintain his balance. Bernheim's affidavit

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[13] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[14] See *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[15] *Koester v VCA Animal Hosp*, 244 Mich App 173, 175; 624 NW2d 209 (2000).

[16] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[17] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (citations omitted).

supported Harrison's theory that the short lace contributed to his accident and injury.[18] That industry standards emphasize that skates be rented with undamaged laces indicates that it is foreseeable that defective laces are known to cause injuries. Further, RHSC apparently has a standard protocol for responding to accidents at the rink that includes inspecting the equipment, from which we can infer that it is aware of the connection between skates that are in disrepair and accidents.

Perhaps, this evidence would not convince a jury at trial to award damages to Harrison. Yet, we must view this evidence in the light most favorable to Harrison as the party opposing summary disposition.[19] From that perspective, Harrison's testimony concerning the frayed lace was adequate to show breach of the duties outlined in the safety manual he submitted to the trial court. Harrison's testimony and Bernheim's affidavit were sufficient to create a question of fact concerning cause in fact. The safety standards and RHSC's protocol to respond to accidents created a question of fact regarding whether Harrison's accident was foreseeable. Further, there is no dispute in the record that Harrison suffered both economic and noneconomic damages because of this accident. Thus, summary disposition was not appropriate for the reasons the trial court stated.

D. Open And Obvious Danger Doctrine

Though Harrison created a question of fact concerning every disputed element of his prima facie case of negligence, our inquiry does not end there. As RHSC argued in its motion for summary disposition and again in this appeal, the facts of this case directly implicate the open and obvious danger doctrine. In *Fisher v Johnson Milk Co, Inc*,[20] the Michigan Supreme Court held that "[t]here is no duty to warn *or protect against* dangers obvious to all."[21] An open and obvious danger is "what is visible or well known."[22] Alternatively, an open and obvious danger can be described as a "defect not observed or observable by [the] plaintiff, which operated in such fashion, unexpectedly, as to be dangerous and to injure [the] plaintiff."[23]

There simply is no question of fact concerning whether the shoe lace presented an open and obvious danger. While we could ruminate about the clues the appearance of the lace would

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[18] RHSC argues that Bernheim's affidavit cannot be considered because Bernheim had not been endorsed to testify at trial. Suffice it to say, Harrison disputes this contention, the affidavit existed in the record at the time the trial court decided the motion for summary disposition, and RHSC has not explained why the contents of the affidavit could be ignored under MCR 2.116(G)(6). Consequently, we see no reason to ignore Bernheim's expert opinion regarding causation.

[19] See *Ritchie-Gamester*, *supra*.

[20] *Fisher v Johnson Milk Co, Inc*, 383 Mich 158, 160; 174 NW2d 752 (1970).

[21] Emphasis added.

[22] *Glittenberg v Doughboy Recreational Industries, Inc*, 436 Mich 673, 695; 462 NW2d 348 (1990).

[23] *Id*. at 162.

have given to a reasonable user, Harrison's own deposition testimony makes this unnecessary. He explicitly said that he noticed the condition of the lace before he started skating. He even briefly mentioned the short lace to his sister, who evidently convinced him to skate with the lace as it was. Indeed, he laced his left skate as far as he could, stopping well before he reached the top eyelet. Thus, we conclude, this danger could not have been any more open or obvious.[24]

In *Owens v Allis-Chalmers Corp*,[25] the Supreme Court limited the open and obvious danger doctrine to "simple" products. Notably, this limitation applied to cases alleging defective design.[26] Assuming that this simple/complex dichotomy might be minimally relevant to a case alleging failure to maintain a product in a safe condition, though Harrison does not concede that a lace or a roller skate is a simple product, we cannot conceive of anything more simple. If the Supreme Court has concluded that a swimming pool is a simple product,[27] then the lace and skate in this case are certainly also simple.

More importantly, whether the open and obvious danger doctrine absolves RHSC of any liability for Harrison's injuries depends on whether the lace still posed an unreasonable risk of harm despite the open and obvious character of its danger. As this Court said in *Pippin v Attallah*,[28] "Where there is a duty to a visitor to make a condition safe . . . potential liability will remain for harm from conditions that are still *unreasonably dangerous despite their open and obvious nature*."[29] Though *Pippin* was a premises liability case, not a product liability case, analogies between these areas of law are common.[30]

We cannot conclude that there was a question of fact regarding the remaining unreasonableness of this risk of harm. Once Harrison saw that the lace was short and that he could not lace his left skate through all the eyelets, which would have given his ankle the support he says was lacking, the danger was even clearer. The solution to the danger was also obvious and simple: Harrison could have asked for a new lace. Regardless of whether he saw the signs urging patrons to return defective skates to the rental counter, Harrison did not have to encounter this hazard. He chose to do so despite the foreseeable risk of falling. We must conclude that this danger was not unreasonable as a matter of law. Summary disposition was, therefore, proper for this other reason.[31]

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[24] See *Glittenberg*, *supra* at 696.

[25] *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982).

[26] See *id*.

[27] *Glittenberg*, *supra* at 696.

[28] *Pippin v Attallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001).

[29] Emphasis added.

[30] See *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 434-435; 542 NW2d 612 (1995).

[31] See *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

V. Amending The Complaint

Harrison contends that the trial court should have granted his motion to amend his complaint. As we suggested in the previous issue, we review the trial court's decision to deny a motion to amend a complaint for an abuse of discretion.[32] Even though MCR 2.116(I)(5) requires the trial court to grant the plaintiff an opportunity to amend the complaint, the requirement is not absolute. MCR 2.116(I)(5) does not allow the plaintiff to amend the complaint if "the evidence then before the court shows that amendment would not be justified." In this case, amendment would have been futile because the open and obvious danger doctrine would still bar RHSC's liability even if Harrison had been allowed to specify in more detail which duties RHSC allegedly breached.[33] The trial court did not abuse its discretion in denying this motion.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[32] See *Weymers*, *supra*.

[33] See *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000).